CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 86252 OF 2013

[Arising out of Order-in-Appeal No: 183/MCH/AC/GR.I/2012 dated 5th March 2013 passed by the Commissioner of Customs (Appeals), Mumbai – I.]

Ajay Exports
C-15 Qutab Institutional Area, New Delhi - 110016 …***Appellant***

versus

Commissioner of Customs (Import)
New Customs House, Ballard Estate, Mumbai - 400001 ***…Respondent***

WITH

CUSTOMS APPEAL NO: 86253 OF 2013

[Arising out of Order-in-Appeal No: 182/MCH/AC/GR.I/2012 dated 5th March 2013 passed by the Commissioner of Customs (Appeals), Mumbai – I.]

Ajay Exports
C-15 Qutab Institutional Area, New Delhi - 110016 …***Appellant***

versus

Commissioner of Customs (Import)
New Customs House, Ballard Estate, Mumbai - 400001 ***…Respondent***

WITH

CUSTOMS APPEAL NO: 86287 OF 2013

[Arising out of Order-in-Appeal No: 173/MCH/AC/GR.I/2012 dated 1st March 2013 passed by the Commissioner of Customs (Appeals), Mumbai – I.]

Radheyshyam Ratanlal
5558 Godadia Market, Khari Baoli, Delhi - 110006 …***Appellant***

versus

Commissioner of Customs (Import)
New Customs House, Ballard Estate, Mumbai - 400001 ***…Respondent***

WITH

CUSTOMS APPEAL NO: 86288 OF 2013

[Arising out of Order-in-Appeal No: 174/MCH/AC/GR.I/2012 dated 1st March 2013 passed by the Commissioner of Customs (Appeals), Mumbai – I.]

Radheyshyam Ratanlal
5558 Godadia Market, Khari Baoli, Delhi - 110006 …***Appellant***

versus

Commissioner of Customs (Import)
New Customs House, Ballard Estate, Mumbai - 400001 ***…Respondent***

WITH

CUSTOMS APPEAL NO: 86289 OF 2013

[Arising out of Order-in-Appeal No: 175/MCH/AC/GR.I/2012 dated 5th March 2013 passed by the Commissioner of Customs (Appeals), Mumbai – I.]

Arushi Exports
C-15 Qutab Institutional Area, New Delhi - 110016 …***Appellant***

versus

Commissioner of Customs (Import)
New Customs House, Ballard Estate, Mumbai - 400001 ***…Respondent***

AND

CUSTOMS APPEAL NO: 87253 OF 2013

[Arising out of Order-in-Appeal No: 309/MCH/AC/GR.I/2012 dated 10th May 2013 passed by the Commissioner of Customs (Appeals), Mumbai – I.]

Tradex India Corporation Pvt Ltd
C-15 Qutab Institutional Area, New Delhi - 110016 …***Appellant***

versus

Commissioner of Customs (Import)
New Customs House, Ballard Estate, Mumbai - 400001 ***…Respondent***

APPEARANCE:

Shri D B Shroff, Senior Counsel with Dr Prabhat Kumar, Advocate for the appellants

Shri Anand Kumar, Additional Commissioner (AR) for the respondent

CORAM:

HON'BLE MR S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NO: A / 85953-85958 /2023

DATE OF HEARING: 09/12/2022
DATE OF DECISION: 08/06/2023

PER: C J MATHEW

These appeals arising from six separate proceedings before the first appellate authority but of common interest, traceable to enhancement of assessable value on consignments of 'white poppy seeds 99% purity' imported from Turkey around the same time, to the four appellants involved are disposed off by this common order.

2. The appellants are aggrieved by the lack of justification for the trigger of rule 10A/rule 12 and in deployment of ammunition in rule 8/ rule 9 of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988/ Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 for undertaking revision, and approved by Commissioner of Customs (Appeals), Mumbai Zone – I, that has

had the effect of fastening duty liability of ₹ 70,82,799[1] and ₹ 68,57,922[2] and of ₹ 1,24,56,230[3] and ₹ 1,21,35,537[4] respectively in two cases each of M/s Ajay Exports and M/s Radheyshyam Ratanlal, ₹ 35,41,389[5] on M/s Arushi Exports and ₹ 33,72,390[6] on M/s Tradex India Corporation Pvt Ltd.

3. It would appear that the four appellants had entered into four separate contracts, all dated 2nd April 2007, with different suppliers in Turkey for import of 510 MTs each of the said goods at US $ 1,700/- PMT. The goods, entered against seven bills of entry filed between June 2007 and December 2007, one bill of June 2007, two bills of June 2007 and four bills between June 2007 and November 2007 by M/s Radheyshyam Ratanlal, M/s Arushi Exports, M/s Tradex India Corporation Pvt Ltd and M/s Ajay Exports respectively, were provisionally assessed and, as a prelude to finalization, show cause notices came to be issued on 18th February 2008 for recovery consequent to enhancement of the value (PMT) to US $ 2,570/- which, however, were withdrawn only to be followed by fresh show cause notices of 12th March 2008 for enhancement of assessable value to US $ 2,906/- PMT and the detriment in the adjudication orders thereof, having been carried to the first appellate authority and

[1][order-in-appeal no.183/MCH/AC/GR.I/2012 dated 5th March 2013]
[2][order-in-appeal no.182/MCH/AC/GR.I/2012 dated 5th March 2013]
[3][order-in-appeal no.173/MCH/AC/GR.I/2012 dated 1st March 2013]
[4][order-in-appeal no.174/MCH/AC/GR.I/2012 dated 1st March 2013]
[5][order-in-appeal no.175/MCH/AC/GR.I/2012 dated 5th March 2013]
[6][order-in-appeal no. 309/MCH/AC/GR.I/2012 dated 10th May 2013]

unsuccessfully so, are now impugned before us.

4. The proceedings, after withdrawal of the first set of notices that also placed reliance on local market value of ₹ 280 per kg indicated by wholesale market index in the MCX commodity exchange, was now limited to reliance on price range of US $ 2,500/- PMT to US $ 3,200/- PMT in ‘Public Ledger’ for ‘poppy seeds’ in support of discarding declared value of exports from Turkey, and being under the control of a single cartel, as not conforming to characteristic of transaction value. The original authority held that the imports effected were for quantities less than that in the contract and that lack of ‘identical’ and ‘similar’ goods sold in the market as such, owing to imports being subjected to further processing, justified the adoption of reported values in ‘Public Ledger’ as acceptable surrogate for ‘transaction value’ in finalizing assessments.

5. Clearly, the disputes straddle two valuation regimes that not only was manifested by substitution of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 with Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 but also in the schematic re-design of section 14 of Customs Act, 1962 with effect from 10th October 2007. The earlier Rules had, themselves, been put through two significant changes by insertion of rule 10A with effect 19th February 1998 and insertion of

qualifying conditions in *proviso* to rule 4(2) for acceptance of price paid or payable as 'transaction value' for the purpose of section 14 which was, itself, intended as the norm originally in July 1988. The difference between the two regimes was the mandate of affinity with conceptual framework for adoption in assessment with prescription of actual payment or 'transaction value' as the 'gold standard' permitting deviation thereto under specified conditions of non-conformity that was transformed by featuring the erstwhile 'gold standard' as manifestation of the concept; consequently, the acceptability of the contracted price was no longer just a desirable prescription but, save in circumstances provided in the Rules, an inevitability thus aligning the statutory provisions with the Agreement on Customs Valuation (ACV) in entirety.

6. Earlier, by amending rule 3 with effect from 7th September 2001 and incorporating further qualifications for acceptance of contracted price as 'transaction value' of imported goods, rule 10A of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 acquired teeth for subjecting declared values to the test of conformity by placing importer on notice that responsibility for establishing acceptability was now shifted and, thereby, disengaging the assessment process from the rigour of compliance with the four conditions, then existing in *proviso* to rule 4(2) of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988, as directed

by the Hon'ble Supreme Court in *Eicher Tractors Ltd v. Commissioner of Customs, Mumbai [2000 (122) ELT 321 (SC)]* at least till the new Rules came into force.

7. According to Learned Senior Counsel appearing for the appellant, no evidence has been adduced by customs authorities to demonstrate that the suppliers of the impugned goods were operating as a cartel and, even if that was so, such oligopoly among suppliers should, contrarily, have caused prices to be higher. It was also submitted that, on mere allegation of cartel operation, recourse was had to the residual method in adjudication and supported in the first appeal. It was further contended that the decision of the Hon'ble Supreme Court in *re Eicher Tractors Ltd* has held that, except by demonstrated breach of conditions in rule 4(2) of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988, 'transaction value' was not liable to be rejected. The reliance placed upon the 'Public Ledger' was vehemently refuted in argument of Learned Senior Counsel as also the appropriateness of inclusion of freight in value determined by resort to the fall back option in the Rules.

8. It was argued by Learned Senior Counsel that the sequential application of methods prescribed in Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 requires reasoned elaboration for discard of the method or all methods preceding the one resorted to which the orders of the lower authorities

are found to be deficient in. It was also submitted that, by adopting the method prescribed in rule 7, the assessable value of ₹ 190/- per kilograms thereby would have precluded further proceedings in the matter. It was also submitted that non-recourse to values available in data base maintained by customs authorities, as must inevitably exist considering the volume of trading in the impugned goods, solely on the ground of unreliability attributable to the Indo-Turkish trade being controlled by cartels is not borne by any facts on record or earlier decisions in disputes engendered by import of such goods in the past. Reliance was also placed on the decisions of the Tribunal in *SK Dhawan v. Commissioner of Customs (Import), Mumbai [2016 (344) ELT 436 (Tri. - Mumbai)]*, in *Commissioner of Customs (Import), Nhava Sheva v. Alfa Textiles [2016 (331) ELT 104 (Tri. – Mumbai)]*, and in *Topsia Estates Pvt Ltd v. Commissioner of Customs (Import-Seaport), Chennai [2015 (330) ELT 799 (Tri. - Chennai)]*.

9. It was also submitted that reliance placed on the prices culled from ‘Public Ledger’, drawn from information on shipments effected to countries in Europe, was not in conformity with Customs Valuation (Determination of Price of Imported Goods) Rules, 1988. It was argued that the Tribunal had, in *Commissioner of Customs (General & CFS) v. Radhey Shyam Ratanlal [2017 (358) ELT 965 (Tri. - Mumbai)]*, held that enhancement of value without undertaking detailed deliberations for rejection of declared value is improper. Further reliance was placed on

the decision in *Radha V Company v. Commissioner of Customs, Mumbai [2003 (156) ELT 810 (Tri. - Mumbai)],* in *Kanhaiyalal & Co v. Commissioner of Customs, Pune [2004 (163) ELT 33 (Tri. - Mumbai)]* and in *Dhirish International v. Commissioner of Customs, Bangalore [2005 (187) ELT 94 (Tri. - Bang)].* It was further contended that reliance placed upon the decision of the Tribunal in *Commissioner of Customs, Tuticorin v. Rabbani Exports [2011 (271) ELT 533 (Tri. - Chennai)]* was misdirected as also that on decision of the Hon'ble Supreme Court in *Radhey Shyam Ratanlal v. Commissioner of Customs (Adjudication), Mumbai [2009 (238) ELT 14 (SC)].* It was also further argued that prices in 'Public Ledger' are of goods of 99.99% purity and hence not acceptable for comparison.

10. *Per contra*, it is the submission of Learned Authorized Representative that the very fact of cartel operation in Indo-Turkish trade, in the absence of effective rebuttal by the appellants, sufficed for rejection of the declared values as not reflecting the transaction price. It was pointed out that the lack of credible contemporaneous data, owing to like blemish of similar imports of the recent past and even by the same group of importers in India, left no option but to fall back on international prices. It was submitted that the reasons for doing so had been cogently enunciated in the impugned order and urged us to accept the same.

11. It would appear from the details of the imports that two of the

bills of entry of M/s Ajay Exports and three of those of M/s Radheyshyam Ratan Lal pertained to the period after the notification of the Customs Valuation (Determination of Value of the Imported Goods) Rules, 2007 and all others to the earlier period. In the light of the allegations and the manner in which assessment has proceeded, the distinguishment between the two regimes is of relevance only upon ascertaining that authority to venture upon the several methods of valuation – transactional or determinative – sequentially did vest in the authority empowered to finalize the provisional assessments. The substitution of the first set of show cause notices of 18th February 2008 by the fresh set of notices dated 12th March 2008, and thereby proposing rejection of the declared value solely on the ground of alleged existence of a cartel operating in Turkey for supply of 'white poppy seeds' of 99% purity, is ample demonstration of intent, though not spelt out categorically, to rely upon the first of the conditions specified in *proviso* to rule 4(2) of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988, *viz.*

> '….
>
> *(a) the sale is in the ordinary course of trade under fully competitive conditions;*
>
> …..'

but preferring to take shelter behind that bulwark of seemingly unencumbered authority of rule 10A of Customs Valuation

(Determination of Price of Imported Goods) Rules, 1988 which, since the amendments of September 2001, afforded latitude for rejection of declaration that had been circumscribed by the decision of the Hon'ble Supreme Court in *re Eicher Tractors Ltd* to identified circumstances therein.

12. Doubtlessly, with that amendment, the grounds for rejection of transaction price were not only substantially expanded to overcome the rigid framework of the existing conditions but also were couched generally enough to preclude similar judicial intervention henceforth; however, the principle of reasonable cause espoused in *re Eicher Tractors Ltd* may be discarded only at the cost of conferment of limitless empowerment, and more particularly from the unabashed resort to 'residual method' of valuation insensible to the obligation of justifying discard of the preceding modes definitively, on customs authorities tasked with valuation of imported goods. Hence the enunciation in *re Eicher Tractors Ltd* that, unlike Customs Valuation Rules, 1963, in the successor Rules

> *'Both Sections 14(1) and Rule 4 provide that the price paid by an importer to the vendor in the ordinary course of commerce shall be taken to be the value in the absence of any of the special circumstances indicated in Section 14(1) and particularized in rule 4(2). Rule 4(1) speaks of the transaction value. Utilization of the definite article indicates that what should be accepted as the value for the purpose of assessment to customs duty is the price actually*

> *paid for the particular transaction, unless of course the price is unacceptable for the reasons set out in Rule 4(2)….if the transaction can be determined under Rule 4(1) and does not fall under any of the exceptions in Rule 4(2), there is no question of determining the value under the subsequent Rules…..*
>
> *Now the special considerations are detailed in Rule 4(2). In the case before us, it is not alleged that the appellant has mis-declared the price actually paid. Nor was there a mis-description of the goods imported…It is also not the respondents case that the particular import fell within any of the situations enumerated in Rule 4(2)……'.*

leaves no room for doubt that rule 10A is a machinery provision to enable 'shifting the burden of proof' to the importer and must, therefore, be restricted by the contours of legislative intent set out in rule 4(2) of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988. That the reaction to the judgement was expansion of the special circumstances reinforces the original legislative intent of rule 10A of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 as a statutory process by which dialogue between importer and customs authority is set in motion for the purpose of arriving at the assessable value. The limiting factors in rule 4(2) of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 must continue to be perceived as the sole validation for venturing upon rule 10A of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988. Any other proposition would only have the effect of empowerment without corresponding accountability.

13. Even in the amended context of rule 4(2) of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 that applies to most of the impugned consignments, it does not suffice for those limiting factors to be drawn upon without proffering evidence of existence of such defined circumstances; mere whims or fancies cannot take the hue of revealed truth or oracular exclamation. The lack of factual evidence in the findings to sustain the contention of cartel operations impedes the consequence of rejection of declared value. Even if some suspicion of cartelization did cross the minds of customs authorities, the assessments were provisional and ample time was available for appropriate inquiry into facts to be incorporated in the notice preceding finalization of assessment. The situation obtaining in *proviso* to rule 3(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 has not retained that special consideration for being resorted to in consignments imported after 10th October 2007. The rejection of declared value is, thus, without authority of law.

14. Turning to the adoption of prices from ‘Public Ledger’, a survey of the several alternatives in Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 and of Customs Valuation (Determination of Value of Imported Goods)

Rules, 2007 do not admit to such option. Rule 8 of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 and rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, titled as the 'residual method', envisages determination using reasonable means consistent with the principles and general provisions of the Rules and is further qualified by restriction on adoption of a value on the basis of, *inter alia*, price of goods for export to country other than India which the 'Public Ledger' makes no pretence of not being. In *re Kanhaiyalal & Co*, it has been held

> *'6. After hearing both sides and considering the matter, it is found :-*
>
> *(a) the application of Rule 10A of the Valuation Rules, 1988 which reads as under : -*
>
> > *"10A. Rejection of declared value. -(1) When the proper officer has reason to doubt the truth or accuracy of the value declared in relation to any imported goods, he may ask the importer of such goods to furnish further information including documents or other evidence and if, after receiving such further information, or in the absence of a response of such importer, the proper officer still has reasonable doubt about the truth or accuracy of the value so declared, it shall be deemed that the value of such imported goods cannot be determined under the provisions of sub-rule (1) of Rule 4.*
> >
> > *(2) At the request of an importer, the proper officer, shall intimate the importer in writing, the grounds for doubting the truth or accuracy of the value declared in relation to goods imported by such importer and provide a reasonable opportunity of being heard, before taking a final decision under sub-rule (1)."*
>
> *provides for a procedure which has to be complied with. In this case, procedure as prescribed vide Rule 10A(1) has not been complied with. Therefore, resort to Rule 10A cannot be upheld.*

(b) The Tribunal in the case of Venus Insulation Products Manufacturing Co. v. CC, Goa [2002 (143) ELT 364 (Tri. - Del)] have held in Para 4.4 of this decision, as regards the application of Rule 10A and other rules especially the provisions of Rule 4, as follows : -

> *"4.4 We further find that the adjudicating authority has grossly misunderstood the legal provisions relating to determination of the value of the goods. He has "invoked" Rule 10A, which is not a substantive provision governing determination of value in the sequential scheme laid down under the Valuation Rules. That rule is a procedural provision, which is meant to act as an aid to determining as to whether it is Clause (i) or Clause (ii) of Rule 3 that will be applicable to a given case. The sequential scheme for determination of value, under the Valuation Rules, comprises Rules 3 to 8. …*
>
> *What has been broadly laid down under Clause (i) of Rule 3 appears in specific terms under Rule 4(1)…. If the facts of a given case will attract any of those exceptions, the case will go out of the purview of Rule 4(1) and, in that case, the transaction value shall be determined by proceeding sequentially through Rules 5 to 8 as prescribed under Clause (ii) of Rule 3. Rule 8 is the residuary provision under this scheme. Rule 9 provides for certain additions to the price actually paid or payable, to arrive at the assessable value. Rule 10 casts an obligation on the importer to declare the details of the value of the goods accurately as also to furnish such document or information as may be required by the proper officer for determination of the assessable value.…..*
>
> *The above rule is a rule of procedure, which enables the proper officer to decide as to whether he can accept the declared value of the goods under Rule 4(1) or should proceed sequentially through Rules 5 to 8 for arriving at the value of the goods. If, even after considering the information documents/evidence furnished by the importer, the proper officer has reasonable doubt about the truth or accuracy of the declared value, it shall be deemed that the value of the goods cannot be determined under Rule 4(1). This deeming provision contained in Rule 10A has necessarily to be pressed into service at the very initial stage under the sequential scheme. It has no role after the scheme has worked itself out."*

Thereafter, the Tribunal held that what was open to the proper officer under Rule 10A was to question the accuracy of the price of the goods mentioned in the documents and without arriving at any good reason for doubting the truth or *accuracy of the same, not to reject the transaction value under Rule 4(1). It was not open to the Customs authorities to rely on general quotations and mere production of price list to discharge the onus cast on them to prove the existence of circumstances indicated in Section 14(1) of the Customs Act and provisions in Rule 4(2) of the Valuation Rules, resorted to rejection of the transaction value and/or the provisions of Rule 10A. Following this decision of the Tribunal, in this case also, when the 'Spice Market Weekly Bulletin and Public Ledger, UK are not found to be inapplicable, there was no reason for the Commissioner to have resorted to Rule 10A or/and rejection of the transaction value in the facts of this case,…. Infact there is no material to exit from the transaction value as depicted by the documents of the importers in the facts of this case. The procedure prescribed for such an exit permissible by Rule 10A has not been followed. Therefore, the orders of the Commissioner coming to a conclusion as regards misdeclaration of value and consequently liability for confiscation under Section 111(m) cannot be upheld….'*

15. The specific discarding of resort to 'Public Ledger' prices for reason of discord with the prescriptions of the Rules framed under section 14 of Customs Act, 1962 is no less applicable here. There is no allegation that the prices declared do not reflect the contractual consideration. There is no allegation of misdeclaration of description of the goods. The conditions precedent to invoking of rule 10A of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 or rule 12 of 4(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 have not been duly

discharged to validate shifting the burden of proof to the importer. After all, non-existence of cartel that has influenced the price, which should be no less of a critical aspect considering that qualification being of relevance in transaction between related person, cannot be evidenced out of thin air but by rebuttal of circumstances from which the existence of a cartel may logically inferred. That lack is fatal to the impugned proceedings.

16. Therefore, for the above reasons we find that the proceedings of the lower authorities have been undertaken on erroneous premise of law which does not even have the saving grace of proper resort to the relevant method of valuation and requires the impugned orders to be set aside for allowing the appeals.

(Order pronounced in the open court on 08/06/2023)

(S.K. MOHANTY)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*